Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-58

DICK JONES, *et al.*,

Petitioners

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS F. OBERDORFER
JAMES ROBERTSON
CARY B. LERMAN
PHILLIP L. RADOFF
1666 K Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioners

Of Counsel:

FLORENCE WAGMAN ROISMAN
2000 P Street, N.W.
Washington, D. C. 20036

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Substantive Background	4
C. Procedural Background	4
D. The District Court Order Denying Class Action Certification Substantially Narrowed the Injunctive Relief Available to Petitioners	7
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Conflicts with the View Adopted by Four Other Circuits	8
II. The Decision Below Departs From Principles Established by this Court	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Brunson v. *Board of Trustees*, 311 F.2d 107 (4th Cir.), *cert. denied*, 373 U.S. 933 (1963) 8, 9
Eisen v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) 10
General Electric Co. v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932) 11, 12, 13
Hackett v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) 8, 10
Jones v. *District of Columbia Redevelopment Land Agency*, 162 U.S. App. D.C. 366, 449 F.2d 502 (1974) 5, 6
Price v. *Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974) 8, 9
Rodgers v. *United States Steel Corp.*, —— F.2d ——, 19 Fed. Rules Serv. 2d 749 (3d Cir. 1975).. 10
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U.S. 449 (1935) 12
Williams v. *Mumford*, —— U.S. App. D.C. ——, 511 F.2d 363 (1975) 6, 7, 10
Yaffe v. *Powers*, 454 F.2d 1362 (1st Cir. 1972) 8

Statutes:

Judicial Code of 1911, ch. 231, § 129, 36 Stat. 1087, 1134 11
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.* 4, 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(a)(1) 2, 3, 5, 6, 8, 9, 10, 11, 12

Other Materials:

"District of Columbia," 5 Weekly Compilation of Presidential Documents 197 (January 31, 1969).. 4
Fed. R. Civ. P. 23 13
Fed. R. Civ. P. 23(b)(2) 2, 8, 11
Fed. R. Civ. P. 23(c)(1) 2, 3, 8
Local Rule 1-13(b), United States District Court for the District of Columbia 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Dick Jones, Govan Sanders, and James Washington [1] respectfully pray that a Writ of Certiorari issue to review the Orders of the United States Court of Appeals for the District of Columbia Circuit refusing to review a decision of the District Court (Corcoran, J.) not to certify this case as a class action on the sole ground that the motion to certify was not timely filed.

OPINIONS BELOW

On February 12, 1975, the Court of Appeals for the District of Columbia Circuit issued an Order granting

[1] Williams H. Patterson, one of the plaintiffs below, died on September 20, 1974.

Respondents' Motion to Dismiss Appeal. By Order of April 11, 1975, the Court denied Petitioners' Suggestion for Rehearing *En Banc*. The Order of the District Court for the District of Columbia, from which the appeal was taken, was issued on August 22, 1974. All three Orders are reprinted in the Appendix.[2]

JURISDICTION

The Order of the United States Court of Appeals for the District of Columbia Circuit denying petitioners' timely Suggestion for Rehearing *En Banc* was entered on April 11, 1975. This Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether a district court order denying a motion to certify class filed under Rules 23(b)(2) and 23(c)(1) of the Federal Rules of Civil Procedure is appealable as of right to the court of appeals pursuant to 28 U.S.C. § 1292(a)(1) when that order has the effect of substantially limiting the relief available on the movant's complaint for injunctive relief.

STATUTORY PROVISIONS INVOLVED

1. *Rule 23(b)(2)*:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

[2] None of the three Orders has been reported. The Order of February 12, 1975, appears at page 1a, the Order of April 11, 1975, appears at page 2a, and the Order of August 22, 1974, appears at pages 3a-4a of the appendix.

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

2. *Rule 23(c)(1)*:

"(c) Determination by Order Whether Class Action to be Maintained; Notice, Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

3. *28 U.S.C. § 1292(a)(1)*:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. Introduction

This Petition invites the Court to resolve a conflict among the circuits on an issue of compelling importance in the prosecution of class action lawsuits seeking injunctive relief. The issue is whether an appeal as of right may be taken from a district court order denying class action certification when the order has the effect of substantially narrowing the scope of preliminary injunctive relief available to petitioners.

B. Substantive Background

The plaintiffs allege injury and seek relief on account of the failure of respondent government agencies to perform their statutory duty to provide low- and moderate-income housing and adequate relocation assistance to persons with little or no income, including plaintiffs and their neighbors, displaced and threatened with displacement by demolition of their residences for urban renewal of the Fourteenth Street Urban Renewal Area in the District of Columbia ("Fourteenth Street Area"). In the wake of disturbances in the District of Columbia during April 1968, the President pledged to take immediate and comprehensive steps under existing Federal statutes to renovate the devastated areas of the city.[3] Over seven years have elapsed, but this Presidential pledge faithfully to execute these laws for the benefit of plaintiffs and others displaced or threatened with displacement by urban renewal has not been honored. Plaintiffs seek to invoke the power of the Federal courts to assure that the laws governing relocation of urban renewal victims, like the petitioners, are more faithfully executed.

C. Procedural Background

Petitioners' original Complaint in this case sought, *inter alia*, a preliminary and permanent injunction (1) to restrain respondents United States Department of Housing and Urban Development and District of Columbia Redevelopment Land Agency ("RLA") from displacing and threatening to displace residents of the Fourteenth Street Area without providing adequate relocation housing and other benefits to which they are entitled under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601

[3] *See* "District of Columbia," 5 Weekly Compilation of Presidential Documents at 197-198 (January 31, 1969). Selected excerpts from the President's statement are reprinted at pages 5a-9a of the appendix.

et seq., and (2) to require RLA to maintain apartment units owned by it in a decent, safe, and sanitary condition.[4]

On March 3 and March 30, 1973, the District Court denied petitioners' application for a preliminary injunction, and on April 10, 1973, petitioners appealed under 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the District of Columbia Circuit. While the appeal was pending, the district court *en banc* adopted a local rule requiring motions for class certification to be filed within ninety days after the filing of the complaint.[5] On October 29, 1973, the District Court stayed all discovery in this action pending the interlocutory appeal.

On April 26, 1974, the Court of Appeals reversed, in part, and remanded the case to the District Court for a hearing on petitioners' application for preliminary injunction, including the issues of (1) whether RLA is providing or plans to provide petitioners and persons similarly situated with adequate relocation housing and other benefits and (2) whether RLA is maintaining and plans to maintain the housing it owns in the Fourteenth Street Area in a decent, safe, and sanitary condition. *Jones* v. *District of Columbia Redevelopment Land*

[4] Pursuant to a District Court order of June 26, 1975, the individual petitioners filed an Amended Complaint on July 7, 1975, alleging, *inter alia*, that defendants have failed to prepare and implement an adequate plan (1) for the relocation of persons displaced and threatened with displacement on account of urban renewal activities in the District of Columbia, and (2) for the provision of the statutorily-required minimum number of housing units for low- and moderate-income individuals and families in the District of Columbia.

[5] Local Rule 1-13(b) was adopted by the district court *en banc* on June 22, 1973, and became effective on August 1, 1973. *See* Foreword, Revised Rules of the United States District Court for the District of Columbia, Rules Service Company at DCDC-i (August 1, 1973).

Agency, 162 U.S. App. D.C. 366, 372-73, 449 F.2d 502, 508-09 (1974).

On remand, present counsel entered the case and, on May 13, 1974, moved to dissolve the stay of discovery.[6] On June 10, 1974, petitioners filed a Motion to Certify Class (reprinted in the appendix at page 10a) and a motion to postpone ruling on class certification pending completion of discovery. Although the class motions were filed less than 90 days after the case was remanded to the District Court and, for the first time subject, as a practical matter, to the new local rule, the District Court denied class certification on August 22, 1974, on the sole ground that the motion to certify was untimely filed.[7]

On October 21, 1974, petitioners appealed the denial of class action certification. On February 12, 1975, the Court of Appeals dismissed the appeal for want of jurisdiction, relying solely on an opinion it issued two days earlier in *Williams* v. *Mumford*, —— U.S. App. D.C. ——, 511 F.2d 363 (1975), holding that 28 U.S.C. § 1292 (a)(1) can never confer jurisdiction to hear an appeal from an interlocutory order denying class certification. Petitioners then filed a timely Suggestion for Rehearing *En Banc*, which was denied on April 11, 1975, with Chief Judge Bazelon and Circuit Judges Wright, Leventhal, and Robinson noting that they would have granted rehearing for the reasons set forth in Judge Robinson's statement of April 4, 1975, in *Williams* v. *Mumford*, —— U.S. App. D.C. at ——, 511 F.2d at 371. (Judge

[6] On June 11, 1974, the District Court partially dissolved its stay of discovery to permit each side to depose only two persons. In all other respects the stay continues in effect pending response by the parties to the District Court's order of June 26, 1975, directing plaintiffs to file an amended complaint on or before July 7, 1975, and directing the respondents to file a motion for summary judgment or a motion to dismiss within ten days thereafter.

[7] In so ruling, the District Court held the motion to postpone mooted.

Robinson's statement is reprinted in the appendix at pages 11a-12a.) This Petition for Writ of Certiorari follows. As the panel and the Court of Appeals *en banc* both relied on *Williams* v. *Mumford*, *petition for cert. filed* May 9, 1975 (No. 74-1411), we respectfully request that this Petition be considered in conjunction with that in *Williams*.

D. The District Court Order Denying Class Action Certification Substantially Narrowed the Injunctive Relief Available to Petitioners

The Order of the District Court denying class action certification in effect precludes petitioners from obtaining the broad injunctive relief prayed for in their Complaint. Although petitioners sought to enjoin respondents from displacing all members of the class without providing adequate relocation housing and other benefits, petitioners can now obtain such relief only as to themselves; although petitioners sought to require respondent RLA to maintain each housing unit it owns within the Fourteenth Street Area in a decent, safe, and sanitary condition, they can now obtain improved maintenance only of their individual apartments. Clearly, the denial of class action certification has the practical and necessary effect of drastically narrowing the scope of injunctive relief available to petitioners.

Denial of class certification might permit respondents to satisfy the needs of the individual petitioners at the expense of their neighbors and thereby avoid responsibility for the performance of respondents' statutory duty to the petitioners *and* their neighbors to adopt and implement a plan that correlates the needs of persons displaced by renewal demolition with an adequate number of adequate units for displacees during the urban renewal cycle.[8]

[8] The defendants could, for example, respond to petitioners' Complaint by temporarily relocating them in one of the limited number of available units, thereby avoiding the government's statutory duty to provide relocation housing for all families it displaces.

It is necessary to proceed by a class action, rather than by individual lawsuit, in order to compel the government respondents to perform their statutory duties and to vindicate and enforce the legal rights of petitioners and their class—notably that of access to relocation benefits and to the number of adequate temporary and permanent housing units required to satisfy the legal rights of that class.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE VIEW ADOPTED BY FOUR OTHER CIRCUITS.

The holding of the District of Columbia Circuit—that 28 U.S.C. § 1292(a)(1) does not confer jurisdiction, under any circumstances, to hear an appeal from an interlocutory order of a district court denying class action certification under Rule 23(b)(2) and (c)(1)—conflicts with the decisions of every other circuit that has considered this issue. Four circuits—the First, Third, Fourth, and Ninth—have held or otherwise recognized that section 1292(a)(1) permits an appeal as of right from orders denying class action certification when the orders would have the effect of narrowing the scope of available injunctive relief. *See Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Brunson* v. *Board of Trustees*, 311 F.2d 107 (4th Cir.), *cert. denied*, 373 U.S. 933 (1963); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); and *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

In *Yaffe* v. *Powers*, the First Circuit squarely held that a district court order denying class certification in effect denied plaintiffs' request for an injunction that would have restrained local police from engaging in citizen surveillance unless necessary to apprehend individuals

accused of specific crimes. The court reasoned that without class certification, injunctive relief would be limited to prohibiting defendants from surveilling the named plaintiffs. The court held, therefore, that section 1292(a)(1) empowered it to hear plaintiffs' interlocutory appeal from the denial of class certification:

> "Although the district court did not specifically act with reference to the injunctive relief claimed in the complaint, the substantial effect of its order denying leave to proceed as a class is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . . [*W*]*e hold the district court's order appealable* [under § 1292(a)(1)] *as a denial of the broad injunctive relief sought* . . . ." 454 F. 2d at 1364-65 (emphasis added).

In *Brunson* v. *Board of Trustees*, the Fourth Circuit entertained an interlocutory appeal by black school children and their parents from a district court order denying class certification in an action to obtain injunctive relief against racial segregation in the public schools. The court found that denial of class certification would bar the plaintiffs from obtaining a general reorganization of all the schools in their district (or, failing that, a plan to desegregate the schools). The court held, therefore, that

> "[t]he limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief . . . . The order [denying class certification] was, therefore, an appealable one under § 1292, for it was a denial of the broad injunctive relief which the plaintiffs sought." 311 F.2d at 108.

Similarly, in *Price* v. *Lucky Stores, Inc.*, the Ninth Circuit held that a district court order preventing plaintiffs from maintaining a class action was appealable as

of right under section 1292(a)(1) because "its effect is a 'denial of the broad injunctive relief' [against allegedly racially discriminatory hiring practices] which the plaintiffs sought on behalf of the class." 501 F.2d at 1179.

Finally, in *Hackett* v. *General Host Corp.*, the Third Circuit stated, albeit by way of dictum,[9] that "in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief," appellate jurisdiction to review the refusal will lie under section 1292(a)(1).[10] This view was reiterated in *Rodgers* v. *United States Steel Corp.*, —— F.2d ——, 19 Fed. Rules Serv. 2d 749, 757 (3d Cir. January 24, 1975) (holding that an interlocutory order merely *postponing* class action determination was not reviewable but "a refusal [to certify a class] might support appellate jurisdiction under § 1292(a)(1).")

Thus, prior to the decision of the District of Columbia Circuit in *Williams* v. *Mumford*, *supra*—and its subsequent decision in the instant case—the courts of appeals were unanimous in finding jurisdiction under section 1292(a)(1) to review orders denying class action certification that had the effect of narrowing the scope of requested injunctive relief. The refusal by the District of Columbia Circuit to accept the view adopted by four other circuits creates a need for a definitive ruling from

[9] The appellant in *Hackett* attempted to invoke the "death knell" theory, under which the denial of class certification has been regarded as a final order within the meaning of 28 U.S.C. § 1291. *See, e.g., Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The Third Circuit in *Hackett* expressed the view that the availability of review under section 1292(a)(1) made it unnecessary to expand the applicability of *Eisen*. 455 F.2d at 622.

[10] The Court asserted that such appeals would adequately "protect against most district court inhospitality to class action litigation involving civil rights, the elective franchise, protection of the environment and the like." 455 F.2d at 622.

this Court to resolve the conflict among the circuits that have considered the question and to provide guidance to those that have yet to consider the issue. In the absence of a definitive ruling from this Court, it is likely that Rule 23(b)(2), an important vehicle for plaintiffs seeking relief in civil rights litigation, will not be administered uniformly in the Federal district courts.

II. THE DECISION BELOW DEPARTS FROM PRINCIPLES ESTABLISHED BY THIS COURT.

This Court has not ruled on the precise issue raised in this Petition. The Court has held, however, that the appealability of an interlocutory order under the predecessor to section 1292(a)(1)[11] does not depend on the form of the order, or on the procedural posture in which it was issued, but on whether the effect of the order is to grant or deny injunctive relief. The Court's earlier ruling applies equally under the successor provision, section 1292(a)(1), and demonstrates the error of the rule adopted below by the Court of Appeals.

In *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932), the defendants counterclaimed for an injunction against alleged patent infringement by the plaintiffs. The district court granted plaintiffs' motion

[11] Judicial Code of 1911, ch. 231, § 129, 36 Stat. 1087, 1134, the predecessor to section 1292(a)(1), provided, in relevant part, as follows:

> "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver, to the circuit court of appeals. . . ."

to dismiss the counterclaim and defendants appealed. This Court affirmed the decision of the court of appeals that the predecssor to section 1292(a)(1) authorized an interlocutory appeal.

The plaintiffs in *General Electric* argued that the order was not appealable since it merely dismissed the counterclaim and did not by its terms refuse an injunction. This Court held, however, that the order dismissing the counterclaim effectively denied injunctive relief, for

> "the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is reviewable under [the predecessor to section 1292(a)(1)] is sustained by reason and supported by the weight of judicial opinion . . . . Plaintiffs' motion to dismiss the appeal was rightly denied." 287 U.S. at 433.[12]

The decision of the Court of Appeals below—that the denial of a motion to certify class is never appealable under section 1292(a)(1)—is inconsistent with this Court's approach in the *General Electric* case. That approach would require the Court of Appeals to assess the

[12] This Court applied the same principle in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935), an action for breach of contract, in which the defendant moved to stay all proceedings pending the outcome of arbitration required by the terms of the contract. Considering the jurisdictional question, *sua sponte*, the Court held that the defendant's motion was effectively an application for an interlocutory injunction, based on the arbitration defense, and that the district court's denial was therefore appealable under the predecessor to section 1292(a)(1). *Id.* at 452. As in *General Electric*, the Court based its ruling not on the form of the motion that gave rise to the district court's order, but on the effect of the order, which was to deny the requested interlocutory injunctive relief.

effect of the denial in limiting the scope of injunctive relief sought in the complaint, rather than focusing merely on the denomination of the motion denied by the District Court. In light of *General Electric*, this Petition should be granted to review the failure of the Court of Appeals to apply principles adopted by this Court.

CONCLUSION

Resolution of the conflict among circuits and correction of the departure of the Court of Appeals below from the principles announced by this Court are important to assure reasonably uniform administration of Rule 23 in the district courts and to provide a judicial remedy for the unlawful government activity that is at issue in this case.

WHEREFORE, petitioners respectfully pray that this Petition be granted.

Respectfully submitted,

LOUIS F. OBERDORFER
JAMES ROBERTSON
CARY B. LERMAN
PHILLIP L. RADOFF
1666 K Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioners

Of Counsel:

FLORENCE WAGMAN ROISMAN
2000 P Street, N.W.
Washington, D. C. 20036

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1974

Civil Action 2258-72
No. 74-2042

DICK JONES, ET AL.,
Appellants

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, ET AL.

Before: MacKinnon and Wilkey, Circuit Judges

ORDER

On consideration of appellants' motion for summary reversal, of appellees' motions to dismiss appeal and for summary affirmance, and of appellees' motion to extend time to file reply to appellants' oppositions to the motions to dismiss and for summary affirmance, and of the responses of the parties with respect to the foregoing motions, it is

ORDERED by the Court that the Clerk is directed to file appellees' reply, it is

FURTHER ORDERED by the Court that appellees' motion to dismiss is granted. See Williams v. Mumford, 73-2120 (decided Feb. 10, 1975). and it is,

FURTHER ORDERED by the Court that the other motions are denied.

Per Curiam

[Dated: February 12, 1975]

[Caption Omitted in Printing]

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, Wilkey, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been transmitted to the full court and there not being a majority of the judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion is denied.

Per Curiam

For the Court:
Hugh E. Kline
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Dated: April 11, 1975]

Chief Judge Bazelon, and Circuit Judges Wright, Leventhal and Robinson would grant rehearing *en banc* for the reasons set forth in Judge Robinson's statement of April 4, 1975, in No. 73-2120, ***Joslyn N. Williams*** v. ***L. Quincy Mumford, Librarian of Congress, et al.***

[Caption Omitted in Printing]

ORDER

The plaintiffs filed their complaint on November 13, 1972. The motion for class action certification was filed June 10, 1974, some 20 months after commencement of the action and following a long history of motions, arguments and appellate proceedings. *Fed. R. Civ. P.* 23(c)(1) requires the filing of a class certification motion "as soon as practicable after the commencement of (the) action." Rule 1-13(b) of this Court requires the filing of such a motion within 90 days after the complaint is filed. It is, then, obvious that plaintiffs' motion for class certification is untimely. *Adise* v. *Mather*, 56 F.R.D. 492, 494-95 (D. Colo. 1972). A delay of 20 months can not be said to be "as soon as practicable," notwithstanding the stay of discovery ordered by this Court and the lengthy time during which this action was on appeal. A different result is not called for, as plaintiffs urge, because the local rule became effective *after* the complaint was filed. The Court, accordingly, declines to grant class action certification.*

---

* Putting aside the question of timeliness, on the present state of the record the Court has serious misgivings as to whether the necessary prerequisites for class action certification are present. The sole remaining issue in the case is the management of the relocation program. It is not apparent that any of the named plaintiffs is directly challenging that program, or that, if he is, his claim is typical of the claims of members of the purported class. Nor does it appear that the plaintiffs could, in view of their previous attempts to halt the housing program, fairly and adequately protect the interests of the members of the purported class which will benefit from that program. *Fed. R. Civ. P.* 23(a).

In view of the foregoing, plaintiffs' motion for postponement of the ruling on class certification is mooted, as is their motion for enlargement of time to reply to defendants' supplemental memoranda.

SO ORDERED.

Dated: August 22, 1974

/s/ H. F. Corcoran
Judge

DISTRICT OF COLUMBIA

Statement by the President on Actions and Recommendations for the Federal City.
January 31, 1969

Responsibility begins at home.

The District of Columbia is the Federal City, and the Federal Government cannot evade its share of responsibility for the conditions of life in the District.

For many who live here, those conditions have become intolerable. Violent crimes in the District have increased by almost three times in the last 8 years; only 2 days ago, the local newspapers carried a report that armed robberies had more than doubled in the past year alone.

This violence—raw, vicious violence, hurting most of all those who are poor and work hard—is the surface manifestation of far deeper troubles.

These troubles have been long building. In part, Washington today is reaping a whirlwind sown long since by rural poverty in the South, by failures in education, by racial prejudice, and by the sometimes explosive strains of rapid social readjustments.

Because its roots are deep and closely woven, crime in the District cannot be brought under control overnight. Neither can poverty be ended or hatred eliminated or despair overcome in a year. But we can begin.

In the 11 days since the new administration took office, I have asked the departments and agencies concerned to make an intensive study—as a matter of first priority—of actions that could be taken now toward curbing crime and improving the conditions of life in the city of Washington.

I wish I could report that we had produced a magic formula that would end crime and sweep away despair overnight. We have not. I have determined on a number of actions and recommendations which will provide a start.

These include:

—A swift start on restoring those areas devastated nearly 10 months ago.

—A package of proposals that can at least help toward restoring the safety of life and property.

—A commitment to give the people of the District of Columbia the voice they legitimately should have in the public policies that affect their lives.

Before detailing these measures I would like to make two points, both of which may help set the measures themselves in perspective.

I am pleased to report, first, that Mayor Washington and I, together with key members of our respective administrations, have established the basis for what I confidently expect will be the most effective cooperation yet achieved in the relations between the Federal and city governments.

The basic framework within which we both intend to operate is one of local initiative and responsibility, and the fullest possible Federal support—not only in terms of the necessary money, but also by involving the vast array of technical assistance available from within the Federal departments and agencies headquartered here.

Second, the great majority of these actions and recommendations are in the fields of crime control and the administration of justice. I recognize full well that crime and violence are only part of the complex interweave of problems the District faces, and that in the long run

crime itself also requires much more far-reaching and subtle approaches. But the rapidly mounting urgency of the crime crisis in the District marks immediate, direct anticrime measures as the first-priority.

There is another reason for this early and urgent emphasis. Crime in America today is both a primary local responsibility and a primary national concern. Here in the District, the Federal Government bears a special responsibility and has a unique opportunity. By searching for new ways of applying the resources of the Federal Government in the war against crime here, we may discover new ways of advancing the war against crime elsewhere.

These measures are by no means a comprehensive list. They represent things that are clearly needed and can be done now. Other crime control measures will follow, and also additional measures to meet the vast array of the District's other needs.

Restoring the Devastated Areas

Scarcely any of the shops and homes destroyed during the riots of last April have been rebuilt, and very few of those damaged have been made habitable or usable again. These rotting, boarded-up structures are a rebuke to us all, and an oppressive, demoralizing environment for those who live in their shadow. They remind us again of the basic fact that the principal victims of violence are those in whose neighborhoods it occurs.

It is not enough merely to patch up what now exists: we must truly rebuild.

The people of the District—especially, of course, the people who live in these areas, and those who own the land—must decide the purposes for which these blocks will be used. The Federal Government can, however,

pledge its full support for those Federal programs which can enable such redevelopment to proceed, and can further pledge the utmost Executive energy in responding to formal applications from the District.

We have already begun.

Specifically, Secretary Romney informed me today that the Department of Housing and Urban Development has approved a 29.7 million dollar neighborhood development plan for the Shaw area, including the major portion of the 7th Street neighborhood damaged during last April's riots. This plan, the result of several years of preparation, is an accomplishment of which this city can be proud.

It took Secretary Romney's department less than 24 hours to approve this plan for the Shaw area, once it was approved by the City Council last Tuesday and submitted for Federal approval Wednesday evening. This unprecedented process illustrates the commitment of this administration to the meeting of the urgent needs of the Capital City.

Mayor Washington has indicated that he intends to seek similar assistance under the Housing and Urban Development Act of 1968 for rehabilitation of the two major areas of riot damage not covered in the Shaw plan—the areas along 14th Street and H Street. I can assure him that this administration will respond with the same sense of urgency to his request for help in these areas.

He has promised me a tight but serious timetable under which the first construction in these areas would begin next fall.

While the city prepares for this construction—and decides what to do with the 14th and H Street areas—the Department of Housing and Urban Development will

make available $1 million in special interim assistance for improvements in some of the blighted areas. This morning, I watched the first cranes at work clearing rubble to make way for a temporary playground. The District has plans for swings, slides and swimming pools where now there is charred rubble. Street lighting will be improved, roads and sidewalks repaired.

Under section 514 of the 1968 Housing and Urban Development Act, Mayor Washington has undertaken to provide ⅓ matching funds for this $1 million, and the District Government will take the initiative in deciding how this money will be spent. The limited assistance to be provided by the Federal Government under this interim program cannot by itself remake these areas. But it is a first step toward making them more livable, an earnest demonstration of our concern, and a first sign of hope.

[Caption Omitted in Printing]

MOTION TO CERTIFY CLASS

Pursuant to Rule 1-13(b) of the Rules of this Court, plaintiffs hereby move for certification under Rule 23(c)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure that this action may be maintained as a class action on behalf of all persons who have been or are scheduled to be displaced or are otherwise substantially adversely affected by defendants' urban renewal activities within the Fourteenth Street Urban Renewal Area and who have not received or will not receive adequate relocation housing or other benefits to which they are entitled.

Respectfully submitted,

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER

/s/ Cary B. Lerman
CARY B. LERMAN
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

[Caption Omitted in Printing]

ORDER

PER CURIAM.

It appearing that appellants' suggestion for rehearing *en banc* and amicus curiae's suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

Ordered by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Statement of Circuit Judge SPOTTSWOOD W. ROBINSON, III, with whom Chief Judge BAZELON and Circuit Judges J. SKELLY WRIGHT and LEVENTHAL join, as to why they would grant rehearing *en banc*.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

It is hardly necessary in this age to argue the worth of the class action in our ever-expanding system or [sic] jurisprudence. Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and the [sic] contributed immeasurably to efficient judicial administration. It has, too, made its mark on the development of the law. The reports are dotted with landmark cases which without benefit of representative litigation would never have seen the light of day.

Even more profoundly, the class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo." [1]

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[1] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186, 94 S.Ct. 2140, 2156, 40 L.Ed.2d 732, 748 (1974) (Douglas, J. dissenting).

In sum, as two leading authorities have aptly observed, "[i]t now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people." [2] And since class-action litigation could be chilled by nonappealability of denials of certifications save in narrowly limited circumstances, it is highly important to ascertain whether the panel's decision to that effect is correct.[3] The importance of the question is underscored by the number of decisions it has generated in other circuits, and the difficulty of the problems of the conflict of opinion which plagues them.[4]

I would, accordingly, grant rehearing of this case *en banc*. That is not necessarily to say that the panel reached the wrong result. It is to say, however, that in my view the matter calls for consideration and decision by the full court.

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[2] 7 C. Wright & A. Miller, Federal Practice § 1751, at 510 (1972).

[3] Rehearing *en banc* is warranted "when the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a)(2).

[4] *See* Yaffee v. Powers, 454 F.2d 1362, 1364-1365 (1st Cir. 1972); Caceres v. International Air Transport Ass'n, 422 F.2d 141, 142-144 (2d Cir. 1970); City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295, 298-299 (2d Cir. 1969); Rodgers v. United States Steel Corp., 508 F.2d 152, 159-161 (3d Cir. 1975); Hackett v. General Host Corp., 455 F.2d 618, 621-626 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); Brunson v. Board of Trustees, 311 F.2d 107, 108-109 (4th Cir. 1962), cert. denied, 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963); Lamarche v. Sunbeam Television Corp., 446 F.2d 880 (5th Cir. 1971); Siebert v. Great Northern Dev. Co., 494 F.2d 510, 511 (5th Cir. 1974); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969); King v. Kansas City Southern Indus., 479 F.2d 1259, 1260 (7th Cir. 1973); Thill Sec. Corp. v. New York Stock Exchange, 469 F.2d 14, 15-17 (7th Cir. 1972); Price v. Lucky Stores, 501 F.2d 1177, 1179 (9th Cir. 1974); Gerstle v. Continental Airlines, 466 F.2d 1374, 1377 (10th Cir. 1972).

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Supreme Court, U. S.
FILED
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No. 75-58

In the Supreme Court of the United States

OCTOBER TERM, 1975

DICK JONES, ET AL., PETITIONERS

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
WALTER KIECHEL,
Acting Assistant Attorney General,
JOHN F. COONEY,
Assistant to the Solicitor General,
CARL STRASS,
LARRY G. GUTTERRIDGE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS

STATEMENT

Petitioners are residents of buildings owned by the District of Columbia Redevelopment Land Agency.[1] On November 13, 1972, they filed an original complaint and motion for a preliminary injunction in the United States District Court for the District of Columbia, invoking the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C.

[1] There are three petitioners: Dick Jones, Govan Sanders and James Washington. The plaintiffs below also included William H. Patterson, who died on September 20, 1974.

594-423—75——1

4321 *et seq.*; the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. 4601 *et seq.*; and the District of Columbia Housing Code. Petitioners sought declaratory and injunctive relief regarding the displacement of residents in the 14th Street Urban Renewal Area and relocation benefits.

In March 1973, the district court denied petitioners' request for a preliminary injunction, except with respect to compliance with NEPA for the second- and third-year Neighborhood Development Programs; however, the court stayed its injunction pending the filing of a final environmental impact statement. On June 8, 1973, the court of appeals denied petitioners' request that the stay be vacated or summarily reversed or that an injunction pending appeal be issued.

Petitioners sought additional preliminary injunctive relief in the district court, but on June 28, 1973, relief was denied on jurisdictional grounds. Furthermore, on July 2, 1973, that court dissolved the preliminary injunction which it had previously issued but stayed.[2] Petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. 1292(a)(1). On April 26, 1974, the court of appeals reversed in part and remanded certain aspects of the case to the district court for a hearing on petitioners' request for a preliminary injunction.

[2] On October 29, 1973 the district court also stayed all discovery pending the appeal (Pet. 5).

On August 1, 1973, while the interlocutory appeal was pending, Local Rule 1–13(b) of the district court became effective. The rule requires that class action motions be filed within ninety days after the filing of a complaint. Petitioners did not file their motion for class action certification under Fed. R. Civ. P. 23(b)(2) until June 10, 1974, some twenty months after filing their complaint and more than ten months after adoption of the rule. The district court denied this motion as untimely, relying upon the local rule and Fed. R. Civ. P. 23(c)(1), which requires that a class action determination must be made as soon as practicable after an action is commenced.[3] The trial court also denied petitioners' motion to take an immediate appeal from this order under 28 U.S.C. 1292(b).

The court of appeals dismissed petitioners' appeal (Pet. App. 1a) on the basis of *Williams* v. *Mumford*, 511 F. 2d 363 (C.A. D.C.), No. 74–1411,[4] certiorari

[3] In a footnote, the court noted its "serious misgivings" about whether petitioners could satisfy the prerequisites to maintenance of a class action imposed by Fed. R. Civ. P. 23(a).

[4] We opposed the granting of certiorari in that case (in this Court, the case was styled as *Joslyn N. Williams and Robert L. Bostick* v. *John G. Lorenz, Acting Librarian of Congress, et al.*, No. 74–1411). Since the district court there had authority under the statute (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. 2000e–16) to provide the full measure of requested injunctive relief despite the denial of class action certification, that denial could not affect the scope of the injunction; accordingly, Section 1292(a)(1) did not apply, regardless of whether that provision confers a right of appeal when the denial of a class action certification does have such an effect.

denied October 6, 1975, in which the court held that the denial of a motion for class action certification constitutes neither the issuance nor the denial of an injunction and is therefore not appealable as of right under 28 U.S.C. 1292(a)(1).

DISCUSSION

1. The question presented in this case is whether petitioners may appeal as of right under Section 1292 (a)(1) from an order of the district court denying certification of a class action under Fed. R. Civ. P. 23(b)(2), where that order allegedly has the effect of narrowing the scope of injunctive relief available should they ultimately prevail on the merits of the litigation (Pet. 7–8). In holding that Section 1292(a)(1) does not authorize such an appeal, the court below agreed with the position adopted by the Second Circuit in *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295, in which that court held that the refusal to certify a class action is neither the issuance nor the denial of an injunction and is therefore not immediately appealable as of right.

These decisions conflict with the rulings of at least three other courts of appeals. The Fourth Circuit held in *Brunson* v. *Board of Trustees,* 311 F. 2d 107, that where the district court dismissed the civil rights class action allegations as to all but the first named plaintiff, whose claim was moot, that order in effect denied the broad injunctive relief plaintiffs sought and was therefore appealable under Section 1292(a)(1). In *Yaffe* v. *Powers,* 454 F. 2d 1362, the First Circuit

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held that although the district court's order did not address plaintiffs' claim for injunctive relief against police harassment of political expression, its denial of class action treatment was appealable where the substantial effect of that order was to narrow considerably the scope of possible injunctive relief available should plaintiffs ultimately prevail on the merits. In *Price* v. *Lucky Stores, Inc.,* 501 F. 2d 1177, the Ninth Circuit held that the district court's dismissal of class action allegations of racial discrimination in employment was appealable under Section 1292(a)(1) because it constituted a denial of the broad injunctive relief plaintiffs sought on behalf of the class. See also *Hackett* v. *General Host Corp.,* 455 F. 2d 618, 622 (C.A. 3) (dictum), certiorari denied, 407 U.S. 925.

2. Appellate review in federal courts is, with limited exceptions,[5] restricted to final judgments[6] of the district courts in order to prevent the debilitating effects on judicial administration caused by piecemeal appellate consideration of what is, in essence, a single controversy. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 170.

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[5] See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (collateral orders). Several courts of appeals have sanctioned immediate appeals from the denial of class action certification under Fed. R. Civ. P. 23 (b)(3) where, as a practical matter, the refusal to certify sounded the "death knell" for the entire action, and thus constituted an appealable final order under 28 U.S.C. 1291. *E.g.*, *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (C.A. 2), certiorari denied, 386 U.S. 1035.

[6] The final judgment rule is presently codified in 28 U.S.C. 1291. Its precursors can be traced directly to the Judiciary Act of 1789, 1 Stat. 73, 84.

As an express exception to the rule of finality, however, 28 U.S.C. 1292(a)(1) provides that the courts of appeals have jurisdiction to review interlocutory orders of the district courts "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," except where direct review may be had in this Court.[7]

In the instant case, after remand petitioners did not renew and the district court did not pass upon their claim for injunctive relief. Their motion for class action certification was dismissed for failure to satisfy procedural rules of timeliness, without regard to the merits of the underlying claim. Furthermore the district court's order denying certification under subsection (b)(2) can be fully reviewed on appeal from the final judgment. Appellate consideration based upon petitioners' allegation that the refusal to certify class action status considerably narrowed the scope of possible permanent injunctive relief would constitute an unwarranted judicial expansion of the statutory language. See *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23; *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176.

Nothing in the interlocutory appeals statute or Rule 23 justifies allowing an appeal as of right from the denial of a subsection (b)(2) class action motion. That the scope of final relief might be affected cannot serve as a basis for invoking Section 1292(a)(1). Such a principle, if accepted, would permit two

[7] See 28 U.S.C. 1253, in regard to interlocutory appeals from orders of three-judge district courts granting or denying injunctive relief.

separate invocations of the appellate process before the merits are reached in subsection (b)(2) class actions seeking preliminary injunctive relief. Furthermore, it would encourage piecemeal appeals of pretrial rulings in virtually all actions for injunctive relief, since innumerable orders affect the scope of the remedy available to the prevailing party.[8] The district court's dismissal of all claims against one defendant, for example, could dramatically narrow the scope of relief available to plaintiffs in a subsection (b)(2) class action. But permitting an immediate interlocutory appeal of this order under Section 1292(a)(1) would seemingly eliminate the necessity of obtaining a certificate under Fed. R. Civ. P. 54(b) before perfecting the appeal.

Moreover, there is no need for such a rule since in 28 U.S.C. 1292(b), Congress has provided a mechanism for review of interlocutory orders, such as the denial of class action motions, which would not otherwise be appealable under Section 1292(a)(1) or Section 1291. We are thus concerned here only with orders that would not qualify for appeal under Section 1292(b)[9]—orders that do not involve a control-

[8] The question naturally arises whether defendants could appeal as of right from an order certifying a subsection (b)(2) class action, since the scope of possible relief would be affected thereby. The Second Circuit's difficulties in propounding rules governing appeals of orders granting class action status under subsection (b)(3) illustrate the compexity of this problem. See, *e.g.*, *General Corp.* v. *City of New York*, 501 F. 2d 639.

[9] As pointed out at p. 3, *supra*, the district court denied petitioners' motion for an immediate appeal of the class action ruling under Section 1292(b).

ling question of law about which there are substantial differences of opinion and in regard to which an immediate appeal could not materially advance ultimate termination of the litigation. There is, we submit, no reason to expand appellate jurisdiction under Section 1292(a)(1) to accommodate such cases.

We thus believe that the decision below was correct and that the district court's order should not have been immediately appealable absent a Section 1292 (b) certification. However, in light of the conflict among the circuits, the recurrent nature of this problem, and the importance of determining the appropriate scope of federal appellate jurisdiction, we do not oppose the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALTER KIECHEL,
Acting Assistant Attorney General.
JOHN F. COONEY,
Assistant to the Solicitor General.
CARL STRASS,
LARRY G. GUTTERIDGE,
Attorneys.

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